

AMENDED IN ASSEMBLY SEPTEMBER 6, 2013

AMENDED IN ASSEMBLY AUGUST 19, 2013

AMENDED IN ASSEMBLY AUGUST 6, 2013

AMENDED IN SENATE MAY 24, 2013

AMENDED IN SENATE APRIL 8, 2013

## **SENATE BILL**

**No. 670**

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### **Introduced by Senator Steinberg**

February 22, 2013

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An act to amend Sections 2225 and 2234 of, and to add Section 2221.5 to, the Business and Professions Code, and to amend Section 11529 of the Government Code, relating to healing arts.

#### LEGISLATIVE COUNSEL'S DIGEST

SB 670, as amended, Steinberg. Physicians and surgeons: drug prescribing privileges: investigation.

(1) Existing law authorizes investigators and representatives of the Medical Board of California, among others, to inquire into any alleged violation of the Medical Practice Act or any other federal or state law, regulation, or rule relevant to the practice of medicine or podiatric medicine, and to inspect documents relevant to those investigations, including the inspection and copying of any document relevant to an investigation where patient consent is given.

Existing law requires specified persons, including the administrator of a peer review body, to file a report with the board within 15 days after the effective date of any specified action taken against a licensee for a medical disciplinary cause or reason. Existing law also requires a coroner to make a report to the board, among other specified entities,

when he or she receives information that indicates that a death may be the result of a physician and surgeon's, podiatrist's, or physician assistant's gross negligence or incompetence.

This bill would authorize the board, in any investigation that involves the death of a patient, to inspect and copy the medical records of the deceased patient without the authorization of the beneficiary or personal representative of the deceased patient or a court order solely to determine the extent to which the death was the result of the physician and surgeon's violation of the Medical Practice Act, if the board provides a written request to the physician and surgeon that includes a declaration that the board has been unsuccessful in locating or contacting the deceased patient's beneficiary or personal representative after reasonable efforts.

(2) Existing law requires the board to take action against any licensee who is charged with unprofessional conduct. Unprofessional conduct is defined for this purpose to include, among other things, the repeated failure by a licensee who is the subject of a board investigation, in the absence of good cause, to attend and participate in an interview scheduled by the mutual agreement of the licensee and the board.

This bill would revise that definition of unprofessional conduct to include the repeated failure by a licensee who is the subject of a board investigation, in the absence of good cause, to attend and participate in an interview by the board.

(3) Existing law, the Administrative Procedure Act, authorizes the administrative law judge of the Medical Quality Hearing Panel to issue an interim order suspending a license, or imposing drug testing, continuing education, supervision of procedures, or other licensee restrictions.

This bill would further authorize the administrative law judge to issue an interim order limiting the authority to prescribe, furnish, administer, or dispense controlled substances. The bill would also authorize the board, notwithstanding the authority of an administrative law judge to issue an interim order, to impose limitations on the authority of a physician and surgeon to prescribe, furnish, administer, or dispense ~~controlled substances~~ *Schedule II, III, or IV drugs* during a pending investigation if the board has probable cause to believe that the physician and surgeon has prescribed, furnished, administered, or dispensed ~~controlled substances~~ *Schedule II, III, or IV drugs* in violation of the Medical Practice Act and the failure of the board to impose those limitations will *imminently* endanger the public health, safety, or welfare,

*as specified. The bill would require written notification to the physician and surgeon of the limitations at least 10 business days prior to the effective date of those limitations and would specify administrative procedures for the review of the limitations, including, upon the request of the physician and surgeon, requiring a committee of 3 board members to conduct an informal hearing prior to the effective date of the limitations.*

*(4) The California Constitution requires that a statute, court rule, or other authority adopted after November 4, 2004, that limits the public's right of access be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.*

*This bill would, with respect to this constitutional provision, express findings and declarations of the Legislature regarding the privacy interests of patients and doctors that are protected under the bill.*

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Section 2221.5 is added to the Business and
- 2 Professions Code, to read:
- 3 2221.5. (a) (1) Notwithstanding Section 11529 of the
- 4 Government Code, the board may impose limitations on the
- 5 authority of a physician and surgeon to prescribe, furnish,
- 6 administer, or dispense ~~controlled substances~~ *Schedule II, III, or*
- 7 *IV drugs* during a pending investigation if ~~both of the following~~
- 8 ~~apply~~ *the board has probable cause to believe both of the*
- 9 *following:*
- 10 (A) ~~The board has probable cause to believe that the physician~~
- 11 ~~and surgeon has prescribed, furnished, administered, or dispensed~~
- 12 ~~controlled substances~~ *Schedule II, III, or IV drugs* in violation of
- 13 the Medical Practice Act.
- 14 (B) The failure of the board to impose limitations on the
- 15 authority of that physician and surgeon to prescribe, furnish,
- 16 administer, or dispense ~~controlled substances~~ *Schedule II, III, or*
- 17 *IV drugs* will imminently endanger the public health, safety, or
- 18 welfare. *Proof of imminent danger shall include, but not be limited*
- 19 *to, a pattern or practice of prescribing, furnishing, administering,*

1 *or dispensing Schedule II, III, or IV drugs that has led to, or may*  
2 *lead to, death or great bodily injury.*

3 (2) The board shall provide written notice of the limitations to  
4 the affected physician and surgeon at least ~~five~~ 10 business days  
5 prior to the effective date of any ~~limitations imposed pursuant to~~  
6 ~~this subdivision~~ limitations. Notice shall be accomplished by either  
7 24-hour delivery service or personal ~~service~~. service, shall state  
8 the effective date of the limitations, and shall include all of the  
9 following:

10 (A) Affidavits showing that the board has met the requirements  
11 of paragraph (1), including a summary of facts and evidence upon  
12 which the board is relying.

13 (B) An explanation of the time and manner in which the  
14 physician and surgeon may respond to the notice of limitations at  
15 an informal hearing pursuant to subdivision (b).

16 (C) Notice of the physician and surgeon's right to be represented  
17 in a proceeding under subdivision (b).

18 (b) (1) Upon the request of the physician and surgeon to whom  
19 the limitations would apply, a committee of three board members,  
20 appointed by the executive director of the board and comprised  
21 of two physician and surgeons and one public member, shall  
22 conduct an informal hearing prior to the effective date of any  
23 limitations imposed pursuant to subdivision (a). The hearing shall  
24 determine whether the board has met all of the requirements of  
25 paragraph (1) of subdivision (a). For good cause, the committee  
26 may delay the effective date of the limitations in order to complete  
27 a hearing and to issue a decision. The committee's decision shall  
28 take into account all materials and testimony submitted by the  
29 board and the physician and surgeon. The decision by the  
30 committee to sustain, reject, or modify the limitations is final.

31 (2) Meetings of the committee pursuant to this subdivision are  
32 exempt from Article 9 (commencing with Section 11120) of Chapter  
33 1 of Part 1 of Division 3 of Title 2 of the Government Code relating  
34 to public meetings.

35 ~~(b)~~

36 (c) In all cases in which the board, pursuant to this section, has  
37 imposed any limitations on the authority of a physician and surgeon  
38 to prescribe, furnish, administer, or dispense ~~controlled substances~~  
39 *Schedule II, III, or IV drugs*, and a petition for an interim  
40 suspension order is not filed and served against the physician and

1 surgeon pursuant to Section 11529 of the Government Code within  
2 30 business days of the date on which the board imposed the  
3 limitations, the imposed limitations shall be dissolved, and any  
4 record of those dissolved. Any record of the limitations imposed  
5 pursuant to this section shall be removed from the board's Internet  
6 Web site immediately after the limitations are dissolved or when  
7 action is taken pursuant to Section 11529 of the Government Code.

8 (d) Limitations imposed pursuant to this section shall not be  
9 deemed a reportable act by a state medical licensing agency or  
10 board of medical examiners for purposes of the National  
11 Practitioner Data Bank.

12 (e)

13 (e) The board may adopt regulations or policies and procedures  
14 to carry out the provisions of this section.

15 SEC. 2. Section 2225 of the Business and Professions Code is  
16 amended to read:

17 2225. (a) Notwithstanding Section 2263 and any other law  
18 making a communication between a physician and surgeon or a  
19 doctor of podiatric medicine and his or her patients a privileged  
20 communication, those provisions shall not apply to investigations  
21 or proceedings conducted under this chapter. Members of the  
22 board, the Senior Assistant Attorney General of the Health Quality  
23 Enforcement Section, members of the California Board of Podiatric  
24 Medicine, and deputies, employees, agents, and representatives of  
25 the board or the California Board of Podiatric Medicine and the  
26 Senior Assistant Attorney General of the Health Quality  
27 Enforcement Section shall keep in confidence during the course  
28 of investigations, the names of any patients whose records are  
29 reviewed and shall not disclose or reveal those names, except as  
30 is necessary during the course of an investigation, unless and until  
31 proceedings are instituted. The authority of the board or the  
32 California Board of Podiatric Medicine and the Health Quality  
33 Enforcement Section to examine records of patients in the office  
34 of a physician and surgeon or a doctor of podiatric medicine is  
35 limited to records of patients who have complained to the board  
36 or the California Board of Podiatric Medicine about that licensee.

37 (b) Notwithstanding any other law, the Attorney General and  
38 his or her investigative agents, and investigators and representatives  
39 of the board or the California Board of Podiatric Medicine, may  
40 inquire into any alleged violation of the Medical Practice Act or

1 any other federal or state law, regulation, or rule relevant to the  
2 practice of medicine or podiatric medicine, whichever is applicable,  
3 and may inspect documents relevant to those investigations in  
4 accordance with the following procedures:

5 (1) Any document relevant to an investigation may be inspected,  
6 and copies may be obtained, where patient consent is given.

7 (2) Any document relevant to the business operations of a  
8 licensee, and not involving medical records attributable to  
9 identifiable patients, may be inspected and copied if relevant to  
10 an investigation of a licensee.

11 (c) (1) Notwithstanding subdivision (b) or any other law, in  
12 any investigation that involves the death of a patient, the board  
13 may inspect and copy the medical records of the deceased patient  
14 without the authorization of the beneficiary or personal  
15 representative of the deceased patient or a court order solely for  
16 the purpose of determining the extent to which the death was the  
17 result of the physician and surgeon's conduct in violation of the  
18 Medical Practice Act, if the board provides a written request to  
19 the physician and surgeon that includes a declaration that the board  
20 has been unsuccessful in locating or contacting the deceased  
21 patient's beneficiary or personal representative after reasonable  
22 efforts. Nothing in this subdivision shall be construed to allow the  
23 board to inspect and copy the medical records of a deceased patient  
24 without a court order when the beneficiary or personal  
25 representative of the deceased patient has been located and  
26 contacted but has refused to consent to the board inspecting and  
27 copying the medical records of the deceased patient.

28 (2) The Legislature finds and declares that the authority created  
29 in the board pursuant to this section, and a physician and surgeon's  
30 compliance with this section, are consistent with the public interest  
31 and benefit activities of the federal Health Insurance Portability  
32 and Accountability Act (HIPAA).

33 (d) In all cases in which documents are inspected or copies of  
34 those documents are received, their acquisition or review shall be  
35 arranged so as not to unnecessarily disrupt the medical and business  
36 operations of the licensee or of the facility where the records are  
37 kept or used.

38 (e) If documents are lawfully requested from licensees in  
39 accordance with this section by the Attorney General or his or her  
40 agents or deputies, or investigators of the board or the California

1 Board of Podiatric Medicine, the documents shall be provided  
2 within 15 business days of receipt of the request, unless the licensee  
3 is unable to provide the documents within this time period for good  
4 cause, including, but not limited to, physical inability to access  
5 the records in the time allowed due to illness or travel. Failure to  
6 produce requested documents or copies thereof, after being  
7 informed of the required deadline, shall constitute unprofessional  
8 conduct. The board may use its authority to cite and fine a  
9 physician and surgeon for any violation of this section. This remedy  
10 is in addition to any other authority of the board to sanction a  
11 licensee for a delay in producing requested records.

12 (f) Searches conducted of the office or medical facility of any  
13 licensee shall not interfere with the recordkeeping format or  
14 preservation needs of any licensee necessary for the lawful care  
15 of patients.

16 SEC. 3. Section 2234 of the Business and Professions Code is  
17 amended to read:

18 2234. The board shall take action against any licensee who is  
19 charged with unprofessional conduct. In addition to other  
20 provisions of this article, unprofessional conduct includes, but is  
21 not limited to, the following:

22 (a) Violating or attempting to violate, directly or indirectly,  
23 assisting in or abetting the violation of, or conspiring to violate  
24 any provision of this chapter.

25 (b) Gross negligence.

26 (c) Repeated negligent acts. To be repeated, there must be two  
27 or more negligent acts or omissions. An initial negligent act or  
28 omission followed by a separate and distinct departure from the  
29 applicable standard of care shall constitute repeated negligent acts.

30 (1) An initial negligent diagnosis followed by an act or omission  
31 medically appropriate for that negligent diagnosis of the patient  
32 shall constitute a single negligent act.

33 (2) When the standard of care requires a change in the diagnosis,  
34 act, or omission that constitutes the negligent act described in  
35 paragraph (1), including, but not limited to, a reevaluation of the  
36 diagnosis or a change in treatment, and the licensee's conduct  
37 departs from the applicable standard of care, each departure  
38 constitutes a separate and distinct breach of the standard of care.

39 (d) Incompetence.

1 (e) The commission of any act involving dishonesty or  
2 corruption that is substantially related to the qualifications,  
3 functions, or duties of a physician and surgeon.

4 (f) Any action or conduct that would have warranted the denial  
5 of a certificate.

6 (g) The practice of medicine from this state into another state  
7 or country without meeting the legal requirements of that state or  
8 country for the practice of medicine. Section 2314 shall not apply  
9 to this subdivision. This subdivision shall become operative upon  
10 the implementation of the proposed registration program described  
11 in Section 2052.5.

12 (h) The repeated failure by a certificate holder, in the absence  
13 of good cause, to attend and participate in an interview by the  
14 board. This subdivision shall only apply to a certificate holder who  
15 is the subject of an investigation by the board.

16 SEC. 4. Section 11529 of the Government Code is amended  
17 to read:

18 11529. (a) The administrative law judge of the Medical Quality  
19 Hearing Panel established pursuant to Section 11371 may issue  
20 an interim order suspending a license, imposing drug testing,  
21 continuing education, supervision of procedures, limitations on  
22 the authority to prescribe, furnish, administer, or dispense  
23 controlled substances, or other license restrictions. Interim orders  
24 may be issued only if the affidavits in support of the petition show  
25 that the licensee has engaged in, or is about to engage in, acts or  
26 omissions constituting a violation of the Medical Practice Act or  
27 the appropriate practice act governing each allied health profession,  
28 or is unable to practice safely due to a mental or physical condition,  
29 and that permitting the licensee to continue to engage in the  
30 profession for which the license was issued will endanger the  
31 public health, safety, or welfare.

32 (b) All orders authorized by this section shall be issued only  
33 after a hearing conducted pursuant to subdivision (d), unless it  
34 appears from the facts shown by affidavit that serious injury would  
35 result to the public before the matter can be heard on notice. Except  
36 as provided in subdivision (c), the licensee shall receive at least  
37 15 days' prior notice of the hearing, which notice shall include  
38 affidavits and all other information in support of the order.

39 (c) If an interim order is issued without notice, the administrative  
40 law judge who issued the order without notice shall cause the



1 licensee to be notified of the order, including affidavits and all  
2 other information in support of the order by a 24-hour delivery  
3 service. That notice shall also include the date of the hearing on  
4 the order, which shall be conducted in accordance with the  
5 requirement of subdivision (d), not later than 20 days from the  
6 date of issuance. The order shall be dissolved unless the  
7 requirements of subdivision (a) are satisfied.

8 (d) For the purposes of the hearing conducted pursuant to this  
9 section, the licentiate shall, at a minimum, have the following  
10 rights:

11 (1) To be represented by counsel.

12 (2) To have a record made of the proceedings, copies of which  
13 may be obtained by the licentiate upon payment of any reasonable  
14 charges associated with the record.

15 (3) To present written evidence in the form of relevant  
16 declarations, affidavits, and documents.

17 The discretion of the administrative law judge to permit  
18 testimony at the hearing conducted pursuant to this section shall  
19 be identical to the discretion of a superior court judge to permit  
20 testimony at a hearing conducted pursuant to Section 527 of the  
21 Code of Civil Procedure.

22 (4) To present oral argument.

23 (e) Consistent with the burden and standards of proof applicable  
24 to a preliminary injunction entered under Section 527 of the Code  
25 of Civil Procedure, the administrative law judge shall grant the  
26 interim order if, in the exercise of discretion, the administrative  
27 law judge concludes that:

28 (1) There is a reasonable probability that the petitioner will  
29 prevail in the underlying action.

30 (2) The likelihood of injury to the public in not issuing the order  
31 outweighs the likelihood of injury to the licensee in issuing the  
32 order.

33 (f) In all cases in which an interim order is issued, and an  
34 accusation is not filed and served pursuant to Sections 11503 and  
35 11505 within 15 days of the date on which the parties to the hearing  
36 on the interim order have submitted the matter, the order shall be  
37 dissolved.

38 Upon service of the accusation the licensee shall have, in addition  
39 to the rights granted by this section, all of the rights and privileges  
40 available as specified in this chapter. If the licensee requests a

1 hearing on the accusation, the board shall provide the licensee with  
2 a hearing within 30 days of the request, unless the licensee  
3 stipulates to a later hearing, and a decision within 15 days of the  
4 date the decision is received from the administrative law judge, or  
5 the board shall nullify the interim order previously issued, unless  
6 good cause can be shown by the Division of Medical Quality for  
7 a delay.

8 (g) If an interim order is issued, a written decision shall be  
9 prepared within 15 days of the hearing, by the administrative law  
10 judge, including findings of fact and a conclusion articulating the  
11 connection between the evidence produced at the hearing and the  
12 decision reached.

13 (h) Notwithstanding the fact that interim orders issued pursuant  
14 to this section are not issued after a hearing as otherwise required  
15 by this chapter, interim orders so issued shall be subject to judicial  
16 review pursuant to Section 1094.5 of the Code of Civil Procedure.  
17 The relief that may be ordered shall be limited to a stay of the  
18 interim order. Interim orders issued pursuant to this section are  
19 final interim orders and, if not dissolved pursuant to subdivision  
20 (c) or (f), may only be challenged administratively at the hearing  
21 on the accusation.

22 (i) The interim order provided for by this section shall be:

23 (1) In addition to, and not a limitation on, the authority to seek  
24 injunctive relief provided for in the Business and Professions Code.

25 (2) A limitation on the emergency decision procedure provided  
26 in Article 13 (commencing with Section 11460.10) of Chapter 4.5.

27 *SEC. 5. The Legislature hereby finds and declares that Section*  
28 *1 of this bill, which adds Section 2221.5 to the Business and*  
29 *Professions Code, imposes a limitation on the public's right of*  
30 *access to the meetings of public bodies or the writings of public*  
31 *officials and agencies within the meaning of Section 3 of Article*  
32 *I of the California Constitution. Pursuant to that constitutional*  
33 *provision, the Legislature makes the following findings to*  
34 *demonstrate the interest protected by this limitation and the need*  
35 *for protecting that interest:*

36 *The protection of confidential medical information is of great*  
37 *interest to the state and to the health care system. The privacy*  
38 *rights of the patients whose treatment occasioned the hearing*  
39 *would be impaired if the hearing were open to the public.*

O